

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33548

STATE OF IDAHO,	)	2008 Unpublished Opinion No. 551
	)	
Plaintiff-Respondent,	)	Filed: July 14, 2008
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
WILLIAM EVAN THOMPSON, JR.,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fifth Judicial District, State of Idaho, Twin Falls County. Hon. John C. Hohnhorst, District Judge.

Order revoking probation and order denying Rule 35 motion, affirmed.

Molly J. Huskey, State Appellate Public Defender; Justin M. Curtis, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

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LANSING, Judge

William Evan Thompson, Jr. appeals from the district court's order revoking probation and executing a five-year unified sentence with three years determinate.

I.

BACKGROUND

In November of 1995, Thompson was charged with three counts of burglary. Pursuant to a plea agreement, he pled guilty to one count of burglary and the State dropped the remaining charges. On February 12, 1996, the district court imposed a unified sentence of five years, with three years determinate and retained jurisdiction for 180 days. After a successful retained jurisdiction period, the court placed Thompson on probation for two years.

On February 27, 1997, the State filed a report of violation stating that Thompson had filed an altered bill of sale on a truck, applied for loans with a false bill of sale, drove the truck without registering it, displayed fictitious plates, and drove without a valid driver's license or

proof of insurance. Thompson admitted to committing the violations. The court imposed sixty days of jail time, reinstated probation, and ordered intensive supervision. On March 17, 1997, the district court entered a stipulation and order which required that Thompson pay \$8,497.51 in restitution, an obligation owed by Thompson jointly and severally with his accomplice, James Floyd Allinen.

On August 17, 1998, the State filed another report of violation, this time stating that Thompson failed to pay restitution and had been charged with and pled guilty to driving without privileges. Thompson admitted to the violations and the court extended probation for two more years.

On September 11, 2000, the State filed a request to show cause hearing because Thompson had not paid restitution. At the hearing, the parties agreed to an extension of probation for one year for Thompson to pay restitution. Less than a year later, the district court extended probation again to September 11, 2003.

On November 25, 2003, probation was once again extended for one year for failure to pay restitution. Less than one year later, the State filed a report of probation violation stating that Thompson had made no payments towards restitution since November 2001, and that he had failed to report to his probation officer. Thompson admitted to the violations, and probation was once again extended. On October 19, 2004, the district court continued probation for an additional three years and ordered Thompson to pay \$150 per month towards restitution.

On January 24, 2006 the State filed another report of probation violation stating that Thompson had not paid restitution, had been convicted of new crimes in Utah, and had failed to return from Utah as ordered. Thompson admitted to the violations and the district court reinstated probation and ordered 365 days jail time with work release and \$330 to be paid toward restitution each month. Three days later, a work release violation report was filed which stated that Thompson had failed to return to jail immediately after finishing work, and instead went to his brother's house to mow his lawn. Thompson then filed an Idaho Criminal Rule 35 motion for reconsideration and reinstatement of work release. On August 15, 2006, the court revoked probation and ordered execution of the original five-year sentence with three years determinate. The court subsequently denied Thompson's Rule 35 motion.

Thompson now appeals. In the course of this appeal, it was discovered that transcripts of Thompson's sentencing hearing and the hearing at which he entered his guilty plea were not

available because the recording and/or court reporter's notes from those hearings had been lost. Thompson raises to this Court three issues--whether he has been deprived of due process because the court cannot provide a transcript of his sentencing hearing, whether the court abused its discretion by revoking probation and executing sentence, and whether the court abused its discretion by denying Thompson's Rule 35 motion for a reduction of the sentence.<sup>1</sup>

## II. ANALYSIS

### A. Loss of Transcripts

Because transcripts from his sentencing hearing cannot be produced, Thompson argues that he has been deprived of due process. The clerk's record reveals that no evidence was taken at the sentencing hearing, but Thompson argues that a record of his allocution at sentencing is essential and that this Court cannot determine its potential impact on the propriety of his sentence or upon the district court's determination to revoke probation. He contends that as a consequence, this Court should vacate his sentence and the order revoking probation and remand for a resentencing and a renewed probation violation disposition hearing. We conclude, however, that Thompson has not shown that he was prejudiced by the absence of the transcript and, therefore, that he has not been deprived of due process.

The State is required to make available on appeal a record that is sufficient for adequate appellate review of the alleged errors in the proceedings below. *State v. Strand*, 137 Idaho 457, 462, 50 P.3d 472, 477 (2002). Idaho Code § 1-1103 stipulates that all oral proceedings shall be correctly reported, and I.C. § 1-1104 makes the filing of the stenographic records or reports with the district court mandatory. Nevertheless, a court's inability to provide a complete record for an appeal is not automatic grounds for relief. In order to obtain relief, the defendant must show that the omissions from the record have prejudiced him in the appeal. *United States v. Gallo*, 763 F.2d 1504, 1530-31 (6th Cir. 1985); *State v. Polson*, 92 Idaho 615, 620-21, 448 P.2d 229, 234-35 (1968). This showing must encompass "something more than gross speculation that the transcripts were requisite to a fair appeal." *Scott v. Elo*, 302 F.3d 598, 605 (6th Cir. 2002).

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<sup>1</sup> Thompson has not argued on appeal that the district court at any time lost jurisdiction to renew or extend the periods of his probation.

Thompson relies on *Ebersole v. State*, 91 Idaho 630, 428 P.2d 947 (1967), and *Martinez v. State*, 92 Idaho 148, 438 P.2d 893 (1968) to support his argument that an incomplete transcript warrants a new sentencing hearing and probation violation hearing. In *Ebersole*, the defendant was arraigned with no court reporter or clerk present and no court minutes were available. The defendant was not represented by counsel at the arraignment proceedings at which he pleaded guilty. Furthermore, the Supreme Court noted, “From the record it does not appear that the defendant was ever asked if he comprehended what was taking place in court, or as to his financial condition; and certainly there is nothing in the record that reflects any response by appellant to interrogations in regard to his understanding of those rights and reflective of a knowing and intelligent waiver of the right to counsel, essential to a valid waiver of such right.” *Ebersole*, 91 Idaho at 633, 428 P.2d at 950. In *Martinez* also, the defendant was arraigned without the aid of counsel where no court reporter was present to make a record of the proceeding. At the arraignment, the defendant pleaded guilty. He later asserted that he had not been informed of his right to have an attorney appointed for him if he could not afford one. Additionally, the defendant, a Mexican citizen, argued that he did not understand what was taking place at the arraignment. In both *Ebersole* and *Martinez*, during the unreported proceedings the defendants waived all rights and pleaded guilty while unrepresented by counsel. In addition, each defendant filed a petition for a writ of habeas corpus alleging that he had been deprived of due process in some way *during* the unreported arraignment.

Thompson, by contrast, does not contend that any error occurred during his sentencing hearing. He notes that the right of allocution is guaranteed by the Due Process Clause, but he has not shown that the absence of the contents of the allocution prejudices this appeal. The present appeal is taken from the district court’s order revoking probation, which was entered some ten and one-half years after Thompson’s sentencing hearing at which the allocution was presented. In that intervening ten and one-half years, there have been innumerable probation violations with numerous probation violation and disposition hearings. While we do not diminish the significance of the right of allocution, given the overriding importance of the events that occurred after the allocution in this case, we perceive no likelihood that the content of the allocution would have any significant effect on this Court’s determination whether the district court abused its discretion ten years later in revoking probation and denying Thompson’s Rule 35 motion. The record on appeal includes Thompson’s presentence investigation report and

the jurisdictional review report prepared by the Department of Correction at the conclusion of his rider, which provide information on the crime for which he was sentenced, his criminal record and socio-economic background, mental and physical health, and other matters typically found in a presentence report and which aid in evaluation of the reasonableness of his sentence. The record also includes copious information concerning Thompson's behavior while on probation for more than ten years. This information is ample to allow this Court to address Thompson's challenges to the orders revoking his probation and denying his Rule 35 motion. Because Thompson has failed to show that the absence of the sentencing hearing transcript prejudices his appeal, he has not been deprived of due process.

**B. Revocation of Probation**

Thompson argues that the district court abused its discretion when it revoked probation and executed his original sentence. Thompson supports this argument by citing to his successful rider, pained childhood, mental disability, substance and alcohol abuse problems, and his expression of remorse.

Probation may be revoked when it is proved to the satisfaction of the court that any of the terms and conditions of the defendant's probation have been violated. I.C. § 19-2603. In determining whether to revoke probation a court must consider whether probation is meeting the objective of rehabilitation while also providing adequate protection for society. *State v. Upton*, 127 Idaho 274, 275, 899 P.2d 984, 985 (Ct. App. 1995). The decision whether to revoke probation is vested in the sound discretion of the trial court. *State v. Travis*, 125 Idaho 1, 5, 867 P.2d 234, 238 (1994); *State v. Knowlton*, 123 Idaho 916, 920-21, 854 P.2d 259, 263-64 (1993); *State v. Lafferty*, 125 Idaho 378, 381, 870 P.2d 1337, 1340 (Ct. App. 1994); *State v. Grove*, 109 Idaho 372, 373, 707 P.2d 483, 484 (Ct. App. 1985).

After reviewing the record, it is clear that the district court did not abuse its discretion when it revoked probation and executed Thompson's sentence. Thompson violated the terms of his probation numerous times. The court provided many alternative forms of punishment in an effort to avoid revocation of probation, including short periods of confinement, intensive supervision, and extended probation. The court revoked probation as a last resort, and did not abuse its discretion in doing so.

### **C. Denial of Rule 35 Motion**

Thompson argues that the district court abused its discretion when it denied his Rule 35 motion for reconsideration of the sentence. In support of his argument, Thompson notes that he has paid over \$4,000 of the restitution that he and his co-defendant were ordered to pay jointly and severally. Additionally, Thompson asserts that because most of his probation violations were due to his inability to pay restitution, he is not a threat to society.

A Rule 35 motion is a request for leniency which is addressed to the sound discretion of the sentencing court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 159 P.3d 838 (2007). Our focus on review is upon the nature of the offense and the character of the offender. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). Where a sentence is not illegal, the appellant must show that it is unreasonably harsh in light of the primary objective of protecting society and the related goals of deterrence, rehabilitation and retribution. *State v. Broadhead*, 120 Idaho 141, 145, 814 P.2d 401, 405 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992); *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982).

Having reviewed the record, including the new information submitted with Thompson's Rule 35 motion, we find no abuse of discretion in the district court's denial of the motion.

### **III.**

### **CONCLUSION**

Because Thompson was not prejudiced by the unavailability of a transcript of his sentencing hearing, he did not suffer a deprivation of due process. The district court did not abuse its discretion when it revoked probation and executed the sentence, nor when it denied Thompson's Rule 35 motion for reconsideration of the sentence. Therefore, the order revoking probation and the order denying Thompson's Rule 35 motion are affirmed.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**